

When persons sell tangible personal property which they are not otherwise engaged in selling, such transactions may be occasional sales not subject to ROT. See 86 Ill. Adm. Code 130.110. (This is a GIL.)

May 11, 1999

Dear Xxxxx:

This letter is in response to your letter dated January 29, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

The purpose of this letter is to request a written opinion letter, under 2 Ill. Admin. Code § 1200.120, on behalf of our client (hereafter 'Taxpayer') on the application of the Retailers' Occupation Tax Act and the Use Tax Act to the proposed transaction set forth below.

FACTS

The Taxpayer is an Illinois holding company whose subsidiaries are involved in various lines of industrial business. A subsidiary of Taxpayer entered into a contract to purchase an airplane. Since Taxpayer is a closely held company, one of its individual shareholders (hereinafter 'the Shareholder'), a resident of South Carolina, has agreed to purchase the airplane directly from the seller.

The Shareholder will acquire title and risk of ownership to the airplane in Georgia and immediately will move the airplane, which will be operational at that time, to South Carolina. The Shareholder will pay South Carolina sales tax. Immediately after the tax is paid and the airplane is registered in South Carolina, the airplane will be moved to another state to undergo its final outfitting. The airplane will be exempt from sales and use tax in that state under a statutory provision.

During this period of outfitting, the airplane will be flown occasionally and will not enter Illinois. In addition, the Shareholder will lease the airplane, for a fee, to an affiliate of Taxpayer (hereinafter 'Affiliate') while the airplane undergoes outfitting in the other state. After the airplane is finally outfitted, Affiliate will fly the airplane, as provided by the lease.

The airplane will have remained outside of Illinois for a period of at least 91 days from the day of acquisition by Shareholder before it

flies into Illinois. When the airplane first flies into Illinois, the Shareholder will be on-board. After arriving in Illinois with the airplane, the Shareholder will sell it to Taxpayer.

CONCLUSIONS OF TAXPAYER

1. The Shareholder will be exempt from paying use tax on the Shareholder's use of the airplane in Illinois under the nonresident exemption provision of the Use Tax Act, 35 ILCS 105/3-70.
2. The sale of the airplane from the Shareholder to Taxpayer will be an occasional sale of tangible personal property at retail and therefore a nontaxable event under the definition of 'sale at retail' of the Retailers' Occupation Tax Act, 35 ILCS 120/1(1).
3. Taxpayer will not be subject to use tax for its use of the airplane in Illinois under the R.O.T. nontaxability provision of the Use Tax Act, 35 ILCS 105/3-65.

The legal arguments in support of the opinions requested are grounded in statute and case law.

ANALYSIS

Issue One:

The Shareholder will be exempt from paying use tax on the Shareholder's use of the airplane in Illinois.

The Use Tax Act provides that 'the tax imposed by this Act does not apply to the use, in this State, of tangible personal property that is acquired outside this State by a nonresident individual who then brings the property to this State for use here and who has used the property outside this State for at least 3 months before bringing the property to this State.' 35 ILCS 105/3-70.

The Shareholder will qualify for the exemption because the airplane will be used outside of Illinois, for a period of at least three months, in two ways. First, the Shareholder will have the airplane outfitted in another state. Second, the Shareholder will lease the airplane to Affiliate. Under Illinois case law, a lease, for profit-making purposes, of tangible personal property is a use for purposes of the Illinois Use Tax Act. See Telco Leasing, Inc. v. Allphin, 63 Ill.2d 305, 347 N.E.2d 729 (1976) and see Continental Illinois Leasing Corp. v. Department of Revenue, 108 Ill. App.3d 583, 439 N.E.2d 118 (1982). Also, a lease for profit is a use even if the owner/lessor does not physically use the property in Illinois. See Philco Corp. v. Department of Revenue, 40 Ill.2d 312, 239 N.E.2d 805 (1968).

The case law supports our position that a lease, for a fee, of the airplane to Affiliate qualifies as a use of the airplane under the Use Tax Act. In addition, the outfitting itself falls within the statutory definition of use because outfitting of the airplane is a use 'incident to the ownership' of tangible personal property, as provided in 35 ILCS 105/2. Therefore, either the lease to Affiliate or the outfitting in another state qualifies as 'use' of the airplane outside of Illinois, and the Shareholder will be exempt from paying use tax when the Shareholder brings the airplane into Illinois after a time period of at least three months.

A ruling on this issue will be consistent with the Department of Revenue's own pronouncement. According to Information Bulletin, FY 93-22, Department of Revenue, December 1992, 'Businesses relocating into Illinois can no longer take the use tax exemption for titled or registered items (such as vehicles, boats, and aircraft) that have been used three or more months outside Illinois. (*However, individuals still qualify for this exemption.*)' (Emphasis added.) In this situation, the Shareholder is not a business, and the pronouncement clearly states individuals, like the Shareholder, qualify for the exemption under the Use Tax Act, 35 ILCS 105/3-70.

Issue Two:

The sale of the airplane from the Shareholder to Taxpayer will be an occasional sale of tangible personal property at retail.

The Retailers' Occupation Tax Act provides in part that 'the isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail, or a sale through a bulk vending machine, does not constitute engaging in a business of selling such tangible personal property at retail within the meaning of this Act.' 35 ILCS 120/1.

First, the airplane is tangible personal property and the sale of the airplane by the Shareholder to Taxpayer will be a sale at retail. Second, the Shareholder is a person who neither holds himself out as being engaged in nor habitually engages in selling airplanes at retail. Therefore, the sale of the airplane from the Shareholder to Taxpayer will be an occasional sale of tangible personal property at retail and therefore a nontaxable event under the definition of 'sale at retail' of the Retailers' Occupation Tax Act.

Issue Three:

Taxpayer will not be subject to use tax for its use of the airplane in Illinois.

The Use Tax Act provides that 'if the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act does not apply to the use of the tangible personal property in this State.' 35 ILCS 105/3-65.

Under the analysis in Issue Two, above, the seller of the airplane will not be taxable under the Retailers' Occupation Tax Act. Therefore, Taxpayer will not be subject to the use tax for its use of the airplane in Illinois under the R.O.T. nontaxability provision of the Use Tax Act.

Once you have received the authority cited herein, we are certain that you will agree with our interpretation of Illinois law on these issues. We request a written opinion letter regarding all of the issues contained herein. Please address all correspondence to:

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If you should have any questions about this matter, please do not hesitate to contact me at ####. Thank you in advance for your assistance in this matter. I will be looking forward to your response.

In your letter you set out a situation where a closely held Illinois corporation has an individual shareholder, who is a resident of South Carolina, purchase an airplane in Georgia and then after 91 days bring the plane to Illinois and sell it to the corporation.

We do not conclude that the proposed chain of events set out in your letter will result in either the nonresident or occasional sale exemptions. We are not going to sanction this strategy as qualifying for exemption. If your client pursues these tactics, it does so on its own.

The initial purchase of the plane by the individual shareholder and its "use" outside of Illinois is an obvious attempt to circumvent the fact that an Illinois business cannot purchase tangible personal property outside of Illinois and then bring that property to Illinois tax free, 35 ILCS 105/3-70. Frankly, we would view the purchase of the plane by an individual shareholder of a closely held corporation with the intent to subsequently transfer the plane to the corporation as a purchase by the corporation. We see no business purpose in this proposed plan other than an effort to evade Illinois taxes. While we realize that the individual may hold title for a while, we note that when it come to Illinois Use Tax liabilities, the fact that another person may hold title does not necessarily preclude liability on the part of the purchaser. See Miller v. Korchak (1966), 35 Ill.2d 86, where a taxpayer who ordered, paid for, and directed shipment of advertising items was held to be the owner of those items for the purpose of the Use Tax despite an arrangement where it did not take title

to the items and where, for a non-tax purpose, persons other than taxpayer may have been regarded as the owner of the items.

In addition, even assuming arguendo that the purchase of the plane by the individual shareholder is not a purchase by the corporation, we cannot conclude that the occasional sale exemption would apply.

As a general proposition, the occasional sale exemption is only available when a person purchases an item and then, after using the item, disposes of it by selling it. Please refer to 86 Ill. Adm. Code 130.110. When a person purchases an item of tangible personal property with the intention of reselling it to a purchaser for use or consumption, that person engages in conduct equivalent to holding himself out as a retailer. This makes the initial purchase a purchase for resale and the subsequent sale is a taxable sale at retail subject to Illinois Retailers' Occupation and Use Tax liabilities. See 86 Ill. Adm. Code 130.201 and 130.210. An infrequent number of such sales does not transform them into occasional sales because the original objective of purchasing the item for resale to a purchaser for use or consumption establishes that the purpose of the sales transactions are resale (initial transaction) and retail (subsequent transaction).

We note in your proposed scenario that when the individual shareholder purchases the plane, it does so with the intent to resell it to the Corporation. So long as that is the case, the occasional sale exemption is not available and the individual shareholder would therefore be functioning as a retailer and that sale would be subject to Retailers' Occupation and Use Tax liabilities.

I hope this information is helpful. The Department of Revenue maintains a Web site which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Karl Betz
Associate Counsel

KB:msk
Enc.